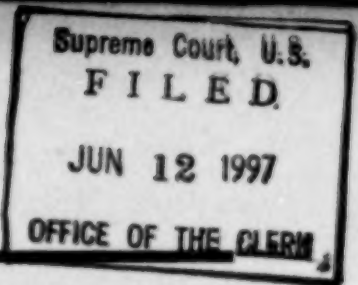


(1)

No. 96-910



IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

**BRIEF OF THE STATE OF INDIANA
AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

JEFFREY A. MODISETT
Attorney General of Indiana
GEOFFREY SLAUGHTER *
ANTHONY SCOTT CHINN
Deputy Attorneys General
219 Statehouse
Indianapolis, IN 46204
(317) 232-6255

* Counsel of Record

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TABLE OF CONTENTS

Table of Authorities	ii	
Interest of <i>Amicus</i>	2	
Summary of Argument	3	
Argument	3	
A District Court's Jurisdiction Over a Removed Action Is Not Defeated by the Mere Presence of a Claim for Which There Is No Independent Basis for Federal Jurisdiction		3
A. Removal jurisdiction lies over all related claims whenever one or more claims are removable under federal-question jurisdiction.		4
B. Civil actions containing claims barred by the Eleventh Amendment are likewise removable.		5
Conclusion	8	

TABLE OF AUTHORITIES

Cases

<i>Alabama v. Pugh</i> , 438 U.S. 781 (1978)	6
<i>Crosetto v. State Bar of Wisconsin</i> , 12 F.3d 1396 (7th Cir. 1993), <i>cert. denied</i> , 511 U.S. 1129 (1994)	2
<i>Frances J. v. Wright</i> , 19 F.3d 337 (7th Cir.), <i>cert. denied</i> , 513 U.S. 876 (1994)	2, 6
<i>Gorka by Gorka v. Sullivan</i> , 82 F.3d 772 (7th Cir. 1996)	2
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890)	2
<i>Henry v. Metropolitan Sewer Dist.</i> , 922 F.2d 332 (6th Cir. 1990)	7
<i>International College of Surgeons v. City of Chicago</i> , 91 F.3d 981 (7th Cir. 1996), <i>cert. granted</i> , 117 S. Ct. 1424 (1997)	5
<i>Kruse v. Hawaii</i> , 68 F.3d 331 (9th Cir. 1995)	7
<i>McKay v. Boyd Constr. Co.</i> , 769 F.2d 1084 (5th Cir. 1985)	6-7
<i>Pennhurst State School & Hosp. v. Halderman</i> , 465 U.S. 89 (1984)	6

<i>Smith v. Wisconsin Dep't of Agriculture</i> , 23 F.3d 1134 (7th Cir. 1994)	2
--	---

Statutes

28 U.S.C. § 1331	4
28 U.S.C. § 1367(a)	2, 3, 4, 5
28 U.S.C. § 1441(a)	2, 3, 4

Other Authorities

Mitchell N. Berman, Note, <i>Removal and the Eleventh Amendment: the Case for District Court Remand Discretion to Avoid a Bifurcated Suit</i> , 92 MICH. L. REV. 3 (1993)	6
James W. Moore, MOORE'S FEDERAL PRACTICE (2d ed. 1996)	4

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INTEREST OF AMICUS

Amicus—and all States—have strong interests in this case. The court of appeals' decision impedes States' ability to remove civil actions and restricts their litigation options in a manner that makes them inferior to all other litigants.

The Seventh Circuit embraced an all-or-nothing rule that prohibits removal of actions containing even a single claim that is outside the district court's original jurisdiction. The reasoning of the court of appeals—in this case and in other circuit precedent on which the decision below is based¹—operates to foreclose State defendants from removing actions that contain claims barred by the Eleventh Amendment or the related doctrine of *Hans v. Louisiana*, 134 U.S. 1 (1890). The result is that district courts have jurisdiction over non-barred federal claims (and related state claims) filed originally in federal court, but lack removal jurisdiction over the identical claims filed in state court that a State defendant wants removed to a federal forum.

The decision below thus creates an interpretive anomaly. It restrictively construed the phrase “civil action . . . of which the district courts . . . have original jurisdiction” in the general removal statute, 28 U.S.C. § 1441(a), in stark contrast to the expansive construction given to the identical phrase in the supplemental-jurisdiction statute, 28 U.S.C. § 1367(a). This anomaly works a special hardship on State defendants' ability vis-à-vis other defendants to remove cases.

¹ *Gorka by Gorka v. Sullivan*, 82 F.3d 772 (7th Cir. 1996); *Smith v. Wisconsin Dep't of Agriculture*, 23 F.3d 1134 (7th Cir. 1994); *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), cert. denied, 513 U.S. 876 (1994); *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), cert. denied, 511 U.S. 1129 (1994). In this case, the City of Chicago's petition for certiorari expressly urged that *Frances J.* be given plenary review. Pet. 18.

SUMMARY OF ARGUMENT

A civil action containing state claims can be removed to federal court if the same action could have been brought initially in federal court under its supplemental jurisdiction. In either case, the action would be within the district court's “original jurisdiction” and thus satisfy the requirements of both the removal and supplemental-jurisdiction statutes. 28 U.S.C. §§ 1367(a), 1441(a).

Civil actions containing claims barred by the Eleventh Amendment are also removable. Well-established precedent of this Court makes clear that the Eleventh Amendment is a jurisdictional bar only to claims. It does not foreclose jurisdiction over actions that include barred claims. Allowing removal of non-barred federal claims also treats State defendants similarly to other defendants that elect to have their federal claims heard in a federal forum.

ARGUMENT

A District Court's Jurisdiction Over a Removed Action Is Not Defeated by the Mere Presence of a Claim for Which There Is No Independent Basis for Federal Jurisdiction

The Seventh Circuit erroneously remanded Respondents' entire action on the ground that it contained a state claim for administrative review that was purportedly outside the district court's original jurisdiction. Even if the state claim were not independently cognizable in federal court, removal of the entire action should have been permitted. Under well-established principles of supplemental jurisdiction, the entire action could have been brought originally in federal court because Respondents' state claim is tied inextricably to their federal-question claims.

A. Removal jurisdiction lies over all related claims whenever one or more claims are removable under federal-question jurisdiction.

The supplemental-jurisdiction statute makes clear that a district court's undisputed jurisdiction over federal-question claims, 28 U.S.C. § 1331, extends to related state claims. "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III[.]" 28 U.S.C. § 1367(a).

Given that all of Respondents' claims would have been within the district court's federal-question or supplemental jurisdiction, the mere fact that the action was brought in state court does not deprive the district court of removal jurisdiction. Like its supplemental-jurisdiction counterpart, the removal statute authorizes federal jurisdiction over "any civil action . . . of which the district courts . . . have original jurisdiction." 28 U.S.C. § 1441(a). See 1A James W. Moore, *MOORE'S FEDERAL PRACTICE* ¶ 0.160[6] at 246 (2d ed. 1996) ("If a federal question claim is pleaded, under § 1367(a), the district courts would have original supplemental jurisdiction over any state law claims that the plaintiff may have Therefore, if an action including both state and federal claims is brought originally in a state court, the district courts would also have supplemental removal jurisdiction under § 1441(a).").

The Seventh Circuit's contrary holding was premised upon a flawed interpretation of the term "civil action." The court erroneously held that the Illinois lawsuit was not a removable "civil action" because it contained a state claim that the district court could not adjudicate independent of any

other grant of jurisdiction. "Under these circumstances, the case removed to the district court cannot be termed a 'civil action . . . of which the district courts . . . have original jurisdiction' within the meaning of section 1441(a)." *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 994 (1996), reprinted at Pet. 22a.

The problem with the court's narrow interpretation of "civil action" under section 1441(a)—to consist only of cases in which all claims are entirely within the district court's original jurisdiction—lies in the troubling implications of similarly interpreting the identical provision under section 1367(a). Supplemental jurisdiction lies over related state claims if—and only if—there already exists a "civil action of which the district courts have original jurisdiction." 28 U.S.C. § 1367(a). That is, the exercise of supplemental jurisdiction presupposes a "civil action."

But, according to the theory of the decision below, a case "cannot be termed a 'civil action'" when a state claim is joined to federal claims in the same lawsuit because the state claim lacks an independent basis for federal jurisdiction. *International College of Surgeons*, 91 F.3d at 994 [Pet. 22a]. Thus, under the Seventh Circuit's reasoning, a federal court could never exercise supplemental jurisdiction over a state claim, no matter how related or integral to the accompanying federal claims, because the mere presence of the state claim would defeat the threshold requirement of a "civil action." This Court should reject the Seventh Circuit's implausible interpretation.

B. Civil actions containing claims barred by the Eleventh Amendment are likewise removable.

Nor is a district court's removal jurisdiction defeated when a civil action arising under federal law contains claims

barred by the Eleventh Amendment. This Court's settled precedent underscores that the Eleventh Amendment bars only particular claims against the State; it does not foreclose federal jurisdiction over whole cases that include such barred claims. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (*Pennhurst II*); *Alabama v. Pugh*, 438 U.S. 781 (1978).²

In *Pugh*, the Court dismissed claims against the State of Alabama and its board of corrections on Eleventh Amendment grounds, yet upheld the federal judgment against state officials sued in their individual capacities. *Id.* at 781-82. Because a federal court's lack of subject-matter jurisdiction cannot be waived, *Pugh* must stand for the proposition that the Eleventh Amendment represents a jurisdictional bar only to claims, not to entire cases that contain claims implicating the Eleventh Amendment. See also *Pennhurst II*, 465 U.S. at 121 ("A federal court must examine each *claim* in a case to see if the court's *jurisdiction over that claim* is barred by the Eleventh Amendment.") (emphasis added).

This precedent shows that civil actions containing non-barred federal claims may be removed or brought in federal court in the first instance, even though the district court must remand or dismiss the barred claims. Because civil actions containing non-barred claims are thus within the district court's "original jurisdiction," they are removable under section 1441(a) if brought initially in a state forum.

Neither the statute's text nor its legislative history supports the contrary result—adopted in some circuits³—that

² See generally Mitchell N. Berman, Note, *Removal and the Eleventh Amendment: the Case for District Court Remand Discretion to Avoid a Bifurcated Suit*, 92 MICH. L. REV. 3 (1993).

³ See, e.g., *Frances J.*, 19 F.3d 337; *McKay v. Boyd Constr. Co.*, 769

a plaintiff can foreclose federal-question removal merely by joining a claim barred by the Eleventh Amendment. These decisions permit precisely the forum-shopping that section 1441 was designed to preclude, allowing plaintiffs who plead cleverly to bar removal by States. The decisions also place States in an inferior position to all other litigants in relation to removal by erecting a bar that applies to no other litigant.

It would be ironic if the amendment constitutionalizing state sovereign immunity in litigation prevented States from removing non-barred federal claims that the States want adjudicated in a federal forum. The very sovereignty protected by the Eleventh Amendment should not be compromised by restricting States' removal power as compared to all other litigants. Just as with other defendants, State defendants might prefer to have non-barred federal claims heard by federal courts, whose expertise and resources may be greater than state courts, and whose decisions are more likely to produce a uniform body of federal law, given that this Court rarely reviews state-court adjudications of federal law. The proper view of federalism places States on the same footing as other litigants and lets States choose whether to remove.

F.2d 1084 (5th Cir. 1985). But see *Kruse v. Hawaii*, 68 F.3d 331, 334 (9th Cir. 1995) (better rule is that "Eleventh Amendment bar against some of the claims of an action does not bar the removal of that action."); *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332 (6th Cir. 1990) (same).

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

JEFFREY A. MODISETT
Attorney General of Indiana
GEOFFREY SLAUGHTER *
ANTHONY SCOTT CHINN
Deputy Attorneys General
219 Statehouse
Indianapolis, IN 46204
(317) 232-6255

* Counsel of Record

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